

Applications of Comcast Corporation,  
General Electric Company  
and NBC Universal, Inc  
For Consent to Assign Licenses or  
Transfer Control of Licensees

MB Docket No. 10-56

integration in the cable industry.<sup>3</sup> The views presented are my own and should not be attributed to my employer or to the Center for Technology, Innovation, and Competition.<sup>4</sup>

Anyone who examines Title 47 of the U.S. Code can attest to the fact that broadcast and cable television are governed by a complex and elaborate array of regulatory requirements and restrictions. As a result, when two media companies in these sectors merge, they typically have to divest themselves of a number of assets and request a variety of waivers before they can complete their merger. When a merger violates one of these rules or creates market conditions likely to harm consumers, it is entirely appropriate to include conditions in the order clearing the transaction requiring that the merging parties bring themselves into compliance.

One of the most striking aspects of the proposed transaction is how clean the combination of Comcast and NBC Universal would be in this regard. The transaction does not create any new compliance issues,<sup>5</sup> and as I will discuss in greater detail later in my testimony, conventional

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<sup>3</sup> See *infra* notes 67-80 and accompanying text.

<sup>4</sup> I have not received any compensation for these comments, nor have I been retained by any party with a financial interest in these proceedings. In the past, Comcast has provided financial support the Center for Technology, Innovation, and Competition (CTIC). Those gifts did not provide Comcast with any input into the programs run by CTIC or the positions taken by CTIC faculty.

<sup>5</sup> NBC Universal and its parent company, General Electric, are addressing two minor, preexisting compliance issues. See Applications and Public Interest Statement by Comcast Corp. General Electric Co., and NBC Universal, Inc., at 73-75 (filed Jan. 28, 2010), *Applications for Consent to the Transfer of Control of Licenses, General Electric Co., Transferor, to Comcast Corp., Transferee* (MB Dkt No. 10-56). NBC's acquisition of Telemundo gave it control of three television stations in the Los Angeles market. Because the Los Angeles broadcast television market is home to more independent ownership groups than any city in the nation and because forced sales reduce the value of stations and artificially limit the range of potential buyers, the FCC ruled that it was in the public interest to grant NBC a temporary waiver of the duopoly rule. *Telemundo Communications Group, Inc. Transferor, and TN Acquisition Corp., Transferee*, Memorandum Opinion and Order, 17 FCC Rcd 6968-79 ¶¶ 46-53 (2002). In addition, the bankruptcy of American Community Newspapers caused debt owned by General Electric to be converted into nonvoting equity, which under the FCC's rules turned General Electric into a partial owner of two small community newspapers in Fort Worth, Texas, whose communities of service fall within the contour of one of its television stations. Given the involuntary nature of such changes, FCC policy usually accords parties subject to such a change in status a reasonable time to come into compliance with these rules. The Public Interest Statement reaffirmed the merging parties' commitment to resolving these issues in a reasonable time frame.

It bears emphasizing that neither of these compliance issues is the result of the proposed merger. They are preexisting issues that are independent of the merger and would exist even if this merger had never been contemplated.

antitrust analysis indicates that the relevant markets are structured in a way that makes it unlikely that the merger will harm consumers.

Despite the fact that consummation of this merger would not create any violations of any of the existing rules, opponents of the transaction are asking regulatory authorities to use the merger clearance process to impose additional conditions on the merging parties. FCC Commissioners and commentators have long criticized the use of merger conditions as a mechanism for making regulatory policy.<sup>6</sup> By their nature, merger conditions impose legal obligations that apply only to the merging parties without covering any other industry participants. The most problematic merger conditions regulate conduct that would be legal under the existing regulations. Moreover, merger conditions are imposed outside of the normal

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<sup>6</sup> For FCC Commissioners' criticisms of the merger conditions, see, e.g., *Verizon Communications Inc. and MCI, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18573 (2005) (separate statement of Abernathy, Comm'r); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, Memorandum Report and Order, 16 FCC Rcd 6547, 6713 (2001) (Powell, Comm'r, concurring in part and dissenting in part); *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 14712, 15197-200 (1999) (Powell, Comm'r, concurring in part and dissenting in part); *id.* at 15174-96 (Furchtgott-Roth, Comm'r, concurring in part and dissenting in part); *Application of Worldcom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to Worldcom, Inc.*, Memorandum Report and Order, 13 FCC Rcd 18025, 18166 (1998) (separate statement of Powell, Comm'r); *id.* at 18159 (separate statement of Furchtgott-Roth, Comm'r); Harold Furchtgott-Roth, *The FCC Racket*, WALL ST. J., Nov. 5, 1999, at A18.

For commentators' criticisms of the merger conditions, see Rachel Barkow & Peter Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. LEGAL F. 29, 54, 62-66, 69-81; William Kovacic, *Antitrust After Microsoft: Upgrading Public Competition Policy Institutions for the New Economy*, 32 UWLA L. REV. 51, 63-64 (2001); William J. Kolasky, *The FCC's Review of the Bell Atlantic/NYNEX and SBC/Ameritech Mergers: Regulatory Overreach in the Name of Promoting Competition*, 68 ANTITRUST L.J. 771, 797-801 (2001); A. Douglas Melamed, *Antitrust: The New Regulation*, ANTITRUST, Fall 1995, at 13; Donald J. Russell & Sherry Lynn Wolfson, *Dual Antitrust Review of Telecommunications Mergers by the Department of Justice and the Federal Communications Commission*, 11 GEO. MASON L. REV. 143, 149-50, 153-54 (2002); Bryan Trammont, *Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy "Voluntary Agreements"*, 53 FED. COMM. L.J. 49, 51-59 (2000); Daniel E. Troy, *Advice to the New President on the FCC and Communications Policy*, 24 HARV. J.L. & PUB. POL'Y 503, 505-09 (2001); Philip J. Weiser, *Institutional Design FCC Reform and the Hidden Side of the Administrative State*, 61 ADMIN. L. REV. 675, 708-11 (2009); Philip J. Weiser, *Reexamining the Legacy of Dual Regulation: Reforming Dual Merger Review by the DOJ and the FCC*, 61 FED. COMM. L.J. 167, 170-74, 198 (2008); Christopher S. Yoo, *New Models of Regulation and Interagency Governance*, 2003 MICH. ST. DCL L. REV. 701, 704; William J. Rinner, Comment, *Optimizing Dual Agency Review of Telecommunications Mergers*, 118 YALE L.J. 1571 (2009).

regulatory processes. For example, they are often not subject to notice and comment. Even when orders clearing mergers are subject to notice and comment, the resolution of the issues is more likely to be driven by the issues raised by a particular transaction and less likely to yield a clear statement of agency policy.

In many cases, merger conditions address conduct that is not the result of the merger, and in most, if not all, cases, these issues addressed by the merger conditions are the subject of ongoing proceedings before the FCC.<sup>7</sup> The use of company-specific adjudications to address issues that confront the entire industry threatens to skew the competitive landscape and raises serious issues of fairness. Moreover, merger conditions cannot be appealed, because the voluntariness of the commitment effectively immunizes it from meaningful judicial review.

At best, the use of the merger review process to impose conditions represents a source of delay and uncertainty that reduces the industry's ability to adjust to a rapidly changing and increasingly challenging technological and economic landscape. At worst, it represents a form of backdoor regulation that hurts consumers, singles out individual companies for restrictions that could not necessarily withstand the rigors of normal regulatory processes, and undermines democratic values as well as the integrity of agency processes.

It is no doubt tempting to use company-specific measures to address industry-wide problems. The FCC has long recognized, however, that even if the existing regulatory regime is not perfect, the better and fairer course is to address these shortcomings through standard regulatory processes rather than through merger conditions. Consistent with these concerns, the

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<sup>7</sup> One classic example is the FCC's conditioning the Bell Atlantic-NYNEX merger on the companies' agreement to abandon any further legal challenges to TELRIC as the methodology for determining access pricing under the Telecommunications Act of 1996. *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee*, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20072-73 ¶ 185 (1997). The legal propriety or impropriety of TELRIC as a pricing methodology did not turn in any way on the merger.

Commission declined to impose merger conditions to address potential problems with access to key cable programming when approving Time Warner's acquisition of Turner Broadcasting.

The Commission concluded that instead of using merger conditions to deal with concerns relating to vertical integration, "[s]uch causes of action relating to program access are properly addressed on a case-by-case basis as required by the Commission's program access rules."<sup>8</sup> The Commission endorsed this same principle when approving the AT&T's acquisitions of TCI and MediaOne,<sup>9</sup> Comcast's acquisition of AT&T's cable properties,<sup>10</sup> and the spinoff of Adelphia's cable properties.<sup>11</sup>

Just last year, when approving AT&T's acquisition of Centennial Corp., the Commission reaffirmed its reluctance to impose merger conditions that "are not narrowly tailored to prevent a transaction-specific harm."<sup>12</sup> Instead the Commission admonished that for harms that "apply broadly across the industry," it is "more appropriate for a Commission proceeding where all interested industry parties have an opportunity to file comments."<sup>13</sup> Particularly given

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<sup>8</sup> *Applications of Turner Broadcasting System, Inc., (Transferor) and Time Warner, Inc., (Transferree)*, Memorandum Opinion and Order, 11 FCC Rcd 19595, 19610 ¶ 33 (1996); *accord id.* 19610 ¶ 34 ("In short, the comments raise concerns properly addressed by the Commission's program access rules.").

<sup>9</sup> *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3179-80 ¶¶ 36-38 (1999); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, Memorandum Opinion and Order, 15 FCC Rcd 9816, 9854 ¶ 81 (2000).

<sup>10</sup> *See Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation*, Memorandum Opinion and Order, 17 FCC Rcd 23246, 23287 ¶ 103 (2002).

<sup>11</sup> *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Commc'ns Corp., Assignors, to Time Warner Cable Inc., Assignees, Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8296-99 ¶¶ 217-223 (2006) [hereinafter *Adelphia Order*].

<sup>12</sup> *Applications of AT&T Inc. and Centennial Communications Corp.*, Memorandum Opinion and Order, 24 FCC Rcd 13915, 13972 ¶ 141 (2009).

<sup>13</sup> *Id.*

Congress's recent criticisms of the FCC for its failure to adhere to sound regulatory practices,<sup>14</sup> the Commission's reiteration of its commitment to follow sound administrative practices is particularly welcome.

Equally importantly, the first step in the regulatory assessment of any merger is to examine the structure of the relevant markets to determine if the industry is sufficiently concentrated to make it possible that the merger will harm consumers. As I will analyze in detail below, the analytical framework recognized by the Supreme Court, Congress, the antitrust regulatory agencies, and this Commission indicates that the relevant markets are sufficiently unconcentrated that the merger is unlikely to have adverse competitive effects. The analytical framework suggests that mergers in markets at these low levels of concentration are ordinarily approved without any further analysis.

## I. THE STANDARD FRAMEWORK FOR ANALYZING THE CONSUMER IMPACT OF MERGERS

The standard framework for evaluating the consumer impact of any merger is enshrined in the Merger Guidelines jointly promulgated by the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice.<sup>15</sup> Recent studies conducted by the Federal Trade Commission and the Justice Department reveal that actual enforcement policy is even more permissive.<sup>16</sup> In addition, the Federal Trade Commission has recently proposed revisions

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<sup>14</sup> STAFF OF H. COMM. ON ENERGY AND COMMERCE, 110TH CONG., DECEPTION AND DISTRUST: THE FCC UNDER CHAIRMAN KEVIN J. MARTIN (Dec. 2008), *available at* <http://energycommerce.house.gov/images/stories/Documents/PDF/Newsroom/fcc%20majority%20staff%20report%20081209.pdf>.

<sup>15</sup> First promulgated in 1968, the portion of the guidelines governing horizontal mergers was last revised in 1997. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (revised Apr. 8, 1997), *available at* <http://www.justice.gov/atr/public/guidelines/hmg.pdf> [hereinafter HORIZONTAL MERGER GUIDELINES]. That revision left in place the existing guidelines governing nonhorizontal (including vertical) mergers, which were last revised in 1984. U.S. DEP'T OF JUSTICE, MERGER GUIDELINES (revised June 14, 1984), *available at* <http://www.justice.gov/atr/public/guidelines/2614.pdf> [hereinafter NON-HORIZONTAL MERGER GUIDELINES].

<sup>16</sup> FED. TRADE COMM'N, HORIZONTAL MERGER INVESTIGATION DATA, FISCAL YEARS 1996-2005, at tbl. 3.1 (Jan. 25, 2007), *available at* <http://www.ftc.gov/os/2007/01/P035603horizmergerinvestigationdata1996-2005.pdf>;

that would liberalize the relevant concentration thresholds of the Merger Guidelines.<sup>17</sup> The thresholds in the current Merger Guidelines should thus be considered safe harbors within which parties should not expect to be challenged. Conversely, the fact that a merger may exceed the relevant thresholds should not be regarded as inherently problematic.

The Merger Guidelines draw a distinction between *horizontal mergers* and *vertical mergers*. A merger is horizontal if it is between two firms that sell products that substitute for one another. In short, consumers are likely to buy one or the other, but not both, which makes the firms selling these products direct competitors. A merger is vertical if it is between firms that sell products that complement one another, in that they are consumed together. The parties to a vertical merger thus do not compete directly with one another.<sup>18</sup> On the contrary, consumers who buy a product that has complements actually has a strong incentive to buy the complement as well, since it is only by buying both products that consumers are able to enjoy them.

Because vertical mergers do not reduce the number of head-to-head competitors and often give rise to procompetitive efficiencies, the consensus in the academic and policymaking community is that vertical integration raises fewer competitive concerns than horizontal

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FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, MERGER CHALLENGES DATA, FISCAL YEARS 1999-2003, at tbl. 1 (Dec. 18, 2003), *available at* <http://www.justice.gov/atr/public/201898.pdf>.

<sup>17</sup> Fed. Trade Comm’n, Horizontal Merger Guidelines for Public Comment: Released on April 20, 2010 (Apr. 20, 2010), <http://www.ftc.gov/os/2010/04/100420hmg.pdf>.

<sup>18</sup> To use a concrete example, consider the difference between computers and the software that runs on them. Suppose there were two computer manufacturers that made devices with similar capabilities and vie to sell their goods to the same consumers. To the extent that consumers regard the decision between these two computers as an either-or choice, these products are considered substitutes, and a combination between those two computer manufacturers would be a horizontal merger.

Consumers do not regard the choice between software and hardware as an either-or choice. On the contrary, a computer that has no software is useless, as is software without a computer on which to run it. As a result, consumers must buy both types of products and use them together to gain any benefit from the products. Rather than being an either-or choice, a consumer buying a computer is more likely to buy software and vice versa. Software and hardware are thus considered complements, and a merger between a software and hardware manufacturer would be considered a vertical merger.

integration.<sup>19</sup> Consequently, the Merger Guidelines incorporate more permissive standards for vertical mergers than for horizontal mergers.<sup>20</sup>

The proposed Comcast-NBC Universal merger has both horizontal and vertical aspects. Both companies serve as sources of video programming, through broadcast networks (such as NBC and Telemundo) or through cable networks (such as the USA Network and the Golf Channel). Both companies also provide retail distribution of video programming, through broadcast television stations owned and operated by NBC or through cable operators owned by Comcast. The merger thus represents three different types of integration: a horizontal merger in the video programming market, a horizontal merger in the retail video distribution market, and a vertical merger joining together these two adjacent levels in the chain of distribution.

For completeness, I will analyze all three effects, beginning with the horizontal effects. That said, although both firms provide both programming and retail distribution, each firm operates predominantly in one product market and maintains only a small presence in the other product market. Specifically, NBC Universal predominantly provides television network programming and is restricted by law to owning only a handful of broadcast stations. Comcast's primary business is in retail video distribution, with its cable networks commanding a mere 3.3% of the market. As a result, the horizontal effects of this proposed merger are likely to be quite small. The primary focus of the inquiry into this merger should be on impact of the vertical combination of these two adjacent levels of production.

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<sup>19</sup> See, e.g., *General Motors Corp. and Hughes Electronics Corp., Transferors, and News Corp., Ltd., Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, 624-25 ¶ 360 (2004) [hereinafter *News Corp.-Hughes Order*] (noting “the general recognition that vertical integration is less likely than horizontal integration to have anticompetitive effects and is more likely to promote efficiency”); *Adelphia Order*, *supra* note 11, at 8238 ¶ 71 (“At the outset, it is important to note that antitrust law and economic analysis have viewed vertical transactions more favorably than horizontal transactions in part because vertical transactions, standing alone, do not directly reduce the number of competitors in either the upstream or downstream markets. In addition, vertical transactions may generate significant efficiencies.”) (citations omitted).

<sup>20</sup> NON-HORIZONTAL MERGER GUIDELINES, *supra* note 15, § 4.0, at 23.



## II. HORIZONTAL INTEGRATION IN THE MARKET FOR RETAIL VIDEO DISTRIBUTION

The proposed Comcast-NBC Universal merger does raise issues of horizontal concentration in the market for retail video distribution. That said, these issues are relatively minor. Simply put, while Comcast is a major player in the market for retail video distribution, NBC Universal is not.

The analytical framework laid out in the Merger Guidelines turns on a measure of concentration known as the Herfindhal-Hirschman Index (HHI), which measures the degree of market concentration by ranking it on a scale from 0 to 10000.<sup>21</sup> Markets with HHIs below 1000 are considered *unconcentrated*.<sup>22</sup> Markets with HHIs between 1000 and 1800 are considered *moderately concentrated*.<sup>23</sup> Markets with HHIs above 1800 are considered *highly concentrated*.<sup>24</sup>

The degree of market concentration determines the degree of antitrust scrutiny. Mergers in *unconcentrated* markets “are unlikely to have adverse competitive effects and ordinarily require no further analysis.”<sup>25</sup> For *moderately concentrated* markets, the level of scrutiny depends on the size of the increase in HHI produced by the merger. If the merger produces an HHI increase of less than 100 points, the guidelines again provide that the merger is “unlikely to have adverse competitive effects and ordinarily require no further analysis.”<sup>26</sup> Mergers in *moderately concentrated* markets that produce an HHI increase of more than 100 points

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<sup>21</sup> According to the Merger Guidelines, HHI is calculated by summing the squares of the individual market shares of all the participants. For example, a market consisting of four firms with market shares of 30%, 30%, 20% and 20% has an HHI of  $30^2 + 30^2 + 20^2 + 20^2 = 2600$ . HORIZONTAL MERGER GUIDELINES, *supra* note 15, § 1.5, at 15 & n.17.

<sup>22</sup> *Id.* § 1.51(a), at 16.

<sup>23</sup> *Id.* § 1.51(b), at 16.

<sup>24</sup> *Id.* § 1.51(c), at 16.

<sup>25</sup> *Id.* § 1.51(a), at 16.

<sup>26</sup> *Id.* § 1.51(b), at 16.

“potentially raise significant competitive concerns” depending on the factors set forth in the other sections of the Guidelines.<sup>27</sup> In *highly concentrated* markets, mergers producing an HHI increase of less than 50 points again are “are unlikely to have adverse competitive effects and ordinarily require no further analysis.”<sup>28</sup> Mergers in *highly concentrated* markets producing an increase of between 50 and 100 points “potentially raise significant competitive concerns” depending on the factors set forth in the other sections of the Guidelines.<sup>29</sup> Mergers in *highly concentrated* markets producing an HHI increase of more than 100 points are presumed “likely to create or enhance market power or facilitate its exercise.”<sup>30</sup> This presumption can be overcome if the merging parties can show that it is “unlikely that the merger will create or enhance market power or facilitate its exercise.”<sup>31</sup>

**Figure 1: HHI Thresholds Under the Current Horizontal Merger Guidelines**

Post-Merger HHI	Increase in HHI Caused by Merger	Outcome
Less than 1000	N/a	Ordinarily requires no further analysis
1000-1800	Less than 100	Ordinarily requires no further analysis
1000-1800	More than 100	Potentially raises significant competitive concerns
More than 1800	Less than 50	Ordinarily requires no further analysis
More than 1800	More than 50	Potentially raises significant competitive concerns
More than 1800	More than 100	Presumed likely to create or enhance market power

Source: HORIZONTAL MERGER GUIDELINES, *supra* note 15, § 1.51, at 16.

Actual enforcement policy has been even more permissive than the Merger Guidelines would suggest. According to a study of merger enforcement policy between 1996 and 2005 (which spanned both Democratic and Republican Administrations), neither the Federal Trade

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* § 1.51(c), at 16.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

Commission nor the Justice Department ever brought an enforcement action when the HHI was less than 2000 and the post-merger increase in HHI was less than 100.<sup>32</sup> Actual enforcement practice in the telecommunications industry was even more permissive,<sup>33</sup> which is understandable given the scale economies inherent in the industry.

Moreover, on April 20, 2010, the Federal Trade Commission sought comment on proposed revisions to the Horizontal Merger Guidelines. The proposed revisions would increase the threshold for *unconcentrated* markets to 1500.<sup>34</sup> Mergers in *unconcentrated* markets would be considered “unlikely to have adverse competitive effects and ordinarily require no further analysis” regardless of the size of the increase in HHI produced by the merger.<sup>35</sup> The range for *moderately concentrated* markets would increase to 1500 to 2500, while the HHI threshold for a market to be considered *highly concentrated* would increase to 2500.<sup>36</sup> In these markets, an HHI increase of less than 100 points would be considered a “small change in concentration,” and any mergers producing an HHI increase of 100 points or less would be considered “unlikely to have adverse competitive effects and ordinarily require no further analysis.”<sup>37</sup> Mergers resulting in HHI increases of more than 100 points “potentially raise significant competitive concerns and often warrant scrutiny.”<sup>38</sup> Mergers in *highly concentrated* markets that increase HHI by 200 or more points would be “presumed likely to enhance market power. The presumption may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.”<sup>39</sup>

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<sup>32</sup> FED. TRADE COMM’N, *supra* note 16, tbl. 3.1; FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, *supra* note 16, tbl. 1.

<sup>33</sup> FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, *supra* note 16, tbl. 6.

<sup>34</sup> Fed. Trade Comm’n, *supra* note 17, § 5.3, at 19.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

**Figure 2: HHI Thresholds Under the FTC’s Proposed Revisions  
to the Horizontal Merger Guidelines**

<b>Post-Merger HHI</b>	<b>Increase in HHI Caused by Merger</b>	<b>Outcome</b>
Less than 1500	N/a	Ordinarily requires no further analysis
1500-2500	Less than 100	Ordinarily requires no further analysis
1500-2500	More than 100	Often warrants scrutiny
More than 2500	Less than 100	Ordinarily requires no further analysis
More than 2500	More than 100	Often warrants scrutiny
More than 2500	More than 200	Presumed likely to enhance market power

Source: Fed. Trade Comm’n, *supra* note 34, § 5.3, at 19.

In the market for retail distribution, competition policy has traditionally drawn a distinction between single-channel television providers (such as broadcasters) and multichannel television providers (such as cable operators like Comcast, satellite television providers like DirecTV, and similar offerings provided by telephone companies, such as Verizon’s FiOS or AT&T’s U-verse), which the statute calls multichannel video programming distributors (MVPDs).

MVPDs participate in multiple markets. First, they serve household subscribers, who consume video programming. Second, they sell advertising. Third, they obtain programs from various programming sources. The geographic scope of these markets differs substantially. The market for subscribers is local in scope. The market for advertising is partly local and partly national, depending on the product being advertised. The market for programming is national.

Beginning first with the local markets, clearly many consumers do not have as many MVPD options as they would like. That fact should not overshadow the ever-increasing competitiveness of local markets for MVPDs. Congress has established a threshold for determining when an MVPD faces sufficiently effective competition to justify exempting it from rate regulation. Under this standard, an MVPD faces effective competition if another MVPD

offers service to at least 50% of households in the service area and the unaffiliated MVPDs together capture more than 15% of the market. An MVPD also faces effective competition if the local exchange carrier offers multichannel service regardless of how many subscribers they have.<sup>40</sup>

Studies show that direct broadcast satellite (DBS) providers, such as DirecTV and the DISH Network, have emerged as direct competitors to cable companies.<sup>41</sup> DBS is available to any household with a clear view of the southern sky and thus should be available in well over 50% of every service area. Moreover, as of the end of 2009, DirecTV's national market share is now 18%, and the DISH Network's market share is now 13%. Published reports indicate that as of mid-2009, DirecTV's share of video subscribers exceeded 15% in 181 out of 211 DMAs, and the DISH Network's share exceeded 15% in 132 out of 211 DMAs. When DBS subscribership is combined with the new offering by telephone companies discussed below, the market share of unaffiliated MVPDs is likely to exceed the 15% threshold in the vast majority of DMAs across the country.<sup>42</sup>

At the same time, telephone companies are investing billions to increase the capacity of their networks and are actively competing with cable operators in the market for distributing multichannel video. Verizon has committed approximately \$24 billion to build out its fiber-based FiOS network. AT&T is investing \$7 billion in its U-verse network. This competition should intensify further as the buildout of these networks continues. As noted earlier, the fact that the local telephone company is offering MVPD services in these service areas automatically

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<sup>40</sup> 47 U.S.C. § 543(l)(1)(B) & (D).

<sup>41</sup> See *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, Report on Cable Industry Prices, 16 FCC Rcd 4346, 4364-65 ¶ 53 (2001); Austan Goolsbee & Amil Petrin, *The Consumer Gains from Direct Broadcast Satellites and the Competition with Cable TV*, 72 *ECONOMETRICA* 351 (2004).

<sup>42</sup> Media Business Corp., Media Census: All Video by DMA, 2Q2009.

indicates that these areas should be considered under the statutory standard as being subject to effective competition.

Most importantly, because NBC Universal does not possess any MVPD properties, the proposed merger would neither increase nor decrease concentration in the MVPD market. As a result, the merger would have no horizontal effect on the 89% of U.S. households that depend on an MVPD for their television service.<sup>43</sup> Although I am certain that these consumers could wish for more options and more competition, the evidence suggests that the market is already quite competitive and becoming more so. At the same time, Comcast possesses no broadcast television stations. The proposed merger will thus also have no effect on the remaining 11% of U.S. households that rely solely on over-the-air service for the television needs.

Although the FCC has previously considered treating broadcast stations and MVPDs as being in the same product market, subsequent congressional action foreclosed this possibility.<sup>44</sup> Moreover, the FCC addressed precisely this issue when determining whether combining DirecTV with the Fox television stations owned by News Corp. raised any horizontal issues. The FCC concluded that a merger combining broadcast stations with an MVPD “does not present horizontal concentration issues” because the FCC has already determined that MVPDs and broadcast television are not sufficiently substitutable to fall within the same product market.<sup>45</sup>

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<sup>43</sup> SNL Kagan, *Basic & HD Cable Economics, 2009-2018*. Although many subscribers complain about increases in cable prices, these have been accompanied by substantial increases in the number of available channels. Empirical studies indicate that when adjusted for the number of channels, rate regulation caused quality-adjusted cable rates to rise, while deregulation caused quality-adjusted cable rates to fall. See THOMAS W. HAZLETT & MATTHEW L. SPITZER, PUBLIC POLICY TOWARD CABLE TELEVISION (1997); Gregory S. Crawford, *The Impact of the Household Demand and Welfare*, 31 RAND J. ECON. 422 (2000).

<sup>44</sup> For the regulatory history examining the circumstances under which broadcasting could be regarded as a substitute for cable, see Yoo, *supra* note 1, at 228 & n.218.

<sup>45</sup> News Corp.-Hughes Order, *supra* note 19, at 509 ¶ 75 (citing *Competition, Rate Deregulation, and the Commission's Policies Relating to the Provision of Cable Services*, Report 5 FCC Rcd 4962, 5001 ¶ 62 (1990)).

Equally importantly, the FCC once imposed a cable-broadcast cross ownership rule preventing a single entity from owning both a cable operator and a television station in the same market. The courts ordered this rule vacated on the grounds that it was inconsistent with the FCC's statutory obligations.<sup>46</sup> The FCC subsequently did so and appears to have abandoned all efforts to reinstate it.<sup>47</sup>

Any attempt to impose merger conditions treating the cross-ownership of a television station and cable operator serving the same metropolitan area as problematic would amount to ad hoc, company-specific regulation of the type that would raise both fairness and procedural concerns. The fact that the courts overturned the rule because of the FCC's inability to offer a principled basis for it dictates that any attempt to penalize the merging parties for such a cross-ownership arrangement would raise concerns under the rule of law.

Even if MVPDs and broadcast stations were treated as being in the same product market, it bears noting that with 26 stations, the merged entity would control less than 2% of the nearly 1400 commercial broadcast television stations in the U.S. In addition, only 6 of those stations operate in areas also predominantly served by Comcast.<sup>48</sup> Thus, in the areas served by 20 of those stations, the merger would not result in any increase in horizontal concentration even if the FCC were to deviate from congressional policy and its prior decisions and treated MVPDs and broadcast stations as falling within the same product market. The only arguable issue would be with respect to the 6 markets in which the merged entity would control both broadcast stations

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[hereinafter 1990 Report on Cable Competition]]; *EchoStar Communications Corp., General Motors Corp., Hughes Electronics Corp. (Transferors) and EchoStar Communications Corp. (Transferees)*, Hearing Designation Order, 17 FCC Rcd 20559, 20607-09 ¶¶ 109-115 (2002).

<sup>46</sup> *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1049-53 (D.C. Cir. 2002).

<sup>47</sup> *1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996*, Order, 18 FCC Rcd 3002 (2003).

<sup>48</sup> Comcast also has a relatively small presence in the New York DMA, in which it serves less than 10% of the area.

and cable distribution. As noted earlier, these markets receive substantial service from both major DBS providers as well telco-provided MVPD services such as FiOS and U-verse. Moreover, an analysis of these markets reveals that each of these markets is served by a substantial number of unaffiliated broadcast channels.<sup>49</sup> Thus, even if the Commission were to break new ground and treat MVPDs and broadcasters as falling within the same product market, it is likely that the 6 overlap markets will remain sufficiently competitive under the thresholds established by the statutes and the relevant agencies to eliminate any concerns that the merger will harm consumers.

**Figure 3: Number of Commercial Over-the-Air Channels Available in Overlap DMAs**

Market	Total Channels	Channels Owned by NBC
Chicago	40	5
San Francisco	31	3
Washington	32	3
Miami	27	4
Philadelphia	30	2
Hartford-New Haven	21	1

Source: BIA Media Access Pro 4.5 Television Analyzer Database, 2009 data.

That said, the decisions ruling that broadcasting and MVPDs constitute distinct product markets antedated the digital television transition. Digital broadcasters have the option to use their channels to transmit multiple streams of standard-definition television.<sup>50</sup> The result is a significant increase in the number of channels available. For example, Los Angeles residents can now receive nearly 70 over-the-air television stations. News reports indicate that the increase is so dramatic that some viewers are considering dropping their MVPD service and instead simply

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<sup>49</sup> The number of total channels includes multicast channels broadcast by the same licensee. Even if one only looks at the number of licensees without taking into account multicasting, the levels of market concentration fall below the levels that would raise antitrust concern.

<sup>50</sup> Yoo, *supra* note 1, at 213.



relying on broadcasting.<sup>51</sup> Including broadcasters and MVPDs in the same product market would radically deconcentrate the market for local television distribution and make them more competitive.

With respect to the national market for programming, the FCC's Annual Assessments of the Status of Competition in the Market for the Delivery of Video Programming (Video Competition Reports) routinely report HHI numbers for the national concentration levels of the MVPD market. Because the FCC has not released data since 2006, I have attempted to reconstruct their calculation from similar sources.

**Figure 3: HHI in the National Market for MVPDs (as of June 2009)**

Company	Subscribers	Share	HHI
Comcast	23,891,000	23.3%	541
DirecTV	18,304,999	17.8%	317
DISH Network	13,610,000	13.2%	176
Time Warner Cable	13,048,000	12.7%	161
Cox	5,316,055	5.2%	27
Charter	4,929,900	4.8%	23
Cablevision	3,093,000	3.0%	9
Verizon FiOS	2,515,551	2.4%	6
Bright House	2,301,320	2.2%	5
AT&T U-verse	1,585,470	1.5%	2
Other	14,139,493	13.8%	5
Total	102,734,788	100.0%	1272

Sources: SNL Kagan, Top Cable MSOs, June 2009; SNL Kagan, Basic & HD Cable Economics, 2009-2018; Media Business Corp., Media Census: All Video by DMA, 2Q2009.

I calculate that as of the end of 2009, the HHI in the national MVPD market was 1272. This represents a drop of 75 points from the year before. The current Merger Guidelines regard the national market for MVPDs is moderately competitive. Moreover, because NBC Universal

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<sup>51</sup> *After Digital Switch, Basic TV Offers Cable Alternative*, NPR WEEKEND EDITION, Feb. 27, 2010, available at <http://www.npr.org/templates/story/story.php?storyId=124056416>; David Sarno, *In the Digital TV Era, Rabbit Ears Multiply*, L.A. TIMES, Dec. 25, 2009, at 1.

does not control any MVPD assets, the post-merger increase in HHI is zero. Thus, under the approach described in the Merger Guidelines, which represents the starting point for all antitrust analyses, the Comcast-NBC Universal merger is “unlikely to have adverse competitive effects” and “ordinarily require no further analysis.”<sup>52</sup> Under the Merger Guidelines, policymakers may thus set aside without any further analysis any concerns about the impact on horizontal concentration in the national market in which MVPDs bargain with sources of television programming.

This conclusion is reinforced by the recent studies of actual FTC and Justice Department enforcement policy. As noted earlier, between 1996 and 2005, neither agency brought an enforcement action in any market with an HHI of less than 2000 and in which the merger caused an increase in HHI of less than 100.<sup>53</sup> When one considers enforcement policy in the telecommunications industry, in which the presence of large economies of scale makes concentration a more endemic market feature, this conclusion becomes even starker.<sup>54</sup>

The situation is even clearer under the FTC’s proposed revisions to the Merger Guidelines. Because HHI is less than 1500, the market would be considered *unconcentrated* under the proposed revisions, and any mergers in this industry would be considered “unlikely to have adverse competitive effects” and “ordinarily require no further analysis” regardless of the size of the increase in HHI produced by the merger.<sup>55</sup>

But perhaps the most transformative development of recent years is the emergence of the Internet as an important avenue for video programming distribution. Internet video distribution

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<sup>52</sup> HORIZONTAL MERGER GUIDELINES, *supra* note 15, § 1.51(b), at 16

<sup>53</sup> FED. TRADE COMM’N, *supra* note 16, tbl. 3.1; FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, *supra* note 16, tbl. 1.

<sup>54</sup> FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, *supra* note 16, tbl. 6.

<sup>55</sup> Fed. Trade Comm’n, *supra* note 17, § 5.3, at 19.

involves two distinct types of industry participants: last-mile broadband access providers and online aggregators of video content (such as YouTube, Netflix, and Hulu).

Consider the market for last-mile broadband access. (I will discuss online aggregators of video programming in the next section as part of my discussion of television networks.) As was the case with MVPDs, last-mile broadband access providers participate in multiple markets. They provide Internet service household subscribers. At the same time, they bargain with content and applications providers, either by bargaining with them directly or by entering into contracts with content delivery networks or other intermediaries.

Focusing first on the market in which last-mile broadband access providers bargain with individual subscribers, the geographic scope of the market for last-mile broadband access is local. Although the market is quite concentrated, the merger would not have any impact whatsoever (adverse or beneficial) on the level of concentration in this market. This is because while Comcast is a major provider of last-mile broadband services, NBC Universal has no last-mile broadband properties.

Focusing next on the market in which last-mile broadband access providers bargain with content and application providers, the geographic scope of this market is national (for the same reasons given above in the discussion of MVPDs). As a result, the relevant measure is the level of concentration in the national market. If one focuses exclusively on the best established broadband technologies (cable modem service, DSL service, and fiber to the home), the market for high speed data is *moderately concentrated* under the standards embodied in the current Merger Guidelines. Under the revisions recently proposed by the FTC, the market would be regarded as *unconcentrated*.

**Figure 5: HHI in the National Market for High Speed Data (as of September 2009)**

<b>Company</b>	<b>Subscribers</b>	<b>Share</b>	<b>HHI</b>
Comcast	15,684,000	21.4%	459
AT&T	15,638,000	21.4%	456
Verizon	9,174,000	12.5%	157
Time Warner Cable	9,167,000	12.5%	157
Cox	4,150,000	5.7%	32
Charter	3,010,100	4.1%	17
Qwest	2,951,000	4.0%	16
Cablevision	2,522,000	3.4%	12
CenturyLink	2,189,000	3.0%	9
Bright House	1,441,384	2.0%	4
Other	7,310,768	10.0%	7
Total	73,237,252	100.0%	1325

Sources: SNL Kagan, Top Cable MSOs, September 2009; Press Release, Leichtman Research Group, Over 900,000 Add Broadband in the Third Quarter of 2009 (Nov. 13, 2009), *available at* <http://www.leichtmanresearch.com/press/111309release.html>.

The calculation does not take into account the impact of wireless broadband, which is becoming an increasingly important avenue for last-mile broadband access. Under the bandwidth thresholds that the Commission currently applies when collecting broadband data,<sup>56</sup> wireless broadband has already captured nearly 25% of the market for high-speed lines (defined as connections providing 200 kbps in at least one direction) and nearly 17% of the market for advanced service lines (defined as connections providing 200 kbps in both directions).<sup>57</sup> Because the market for wireless broadband services are even more competitive than the market

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<sup>56</sup> The Commission has begun collecting data on higher tiers of service. *See Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 9691 (2008). When these data become available, it would be appropriate to conduct further analysis on higher-speed bandwidth tiers. As of now, these data are not yet available.

<sup>57</sup> FED. COMM'NS COMM'N, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF DECEMBER 31, 2008, at 8-9 (Feb. 2010), *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296239A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296239A1.pdf).

for wireline broadband services, the addition of wireless broadband services into the calculation would likely deconcentrate the market still further and make it even more price competitive.

As a result, the market for high speed data is moderately unconcentrated. Again, it bears emphasizing that only one of the merging parties (Comcast) offers high-speed broadband services. The level of competitiveness is determined by the economics of the industry, which typically involves significant fixed costs, rather than the merger. Thus, permitting the merger to proceed would not alter the level of concentration in this market. Conversely, to the extent that the concern is too few options in last-mile broadband services, blocking the merger would not address this concern in any way.

The addition of Internet-based television service should render the market for retail video distribution even more competitive. The changing nature of this market heightens the importance of providing sufficient incentives to invest in upgrading network capacity and capability. The increasing heterogeneity of the technologies for providing broadband access makes the analysis increasingly more complex.

### III. HORIZONTAL INTEGRATION IN THE MARKET FOR TELEVISION NETWORKS

The horizontal issues in the market for video programming are the converse of those raised in the market for retail video distribution. In the case of retail video distribution, NBC Universal has a miniscule presence, while Comcast has a significant share of the market. In the market for television networks, it is the other way around.

It is obvious that NBC Universal is a significant player in the market for television networks. If one considers only cable networks (and ignores broadcast networks) and measures market share in terms of total industry revenue, NBC Universal, led by USA Network, SyFy,

CNBC, and Bravo, has earned an 8.8% share of the market revenue, good for 4th place among all cable programmers.

In contrast, Comcast is a relatively minor provider of cable programming. Its highest ranked channel is E! Entertainment Television, which checks in as the 34th-highest grossing channel.<sup>58</sup> Altogether, Comcast's cable programming properties account for only 3.3% of overall market revenues.

**Figure 6: HHI in the Market for National Cable Networks as Measured by Total Revenue (as of April 2009)**

Company	Revenue (millions)	Pre-Merger Share	HHI	Post-Merger Share	HHI
Walt Disney	\$9,388	20.6%	426	20.6%	426
Time Warner Inc.	\$8,471	18.6%	347	18.6%	347
Viacom	\$5,528	12.2%	148	12.2%	148
NBC Universal	\$4,003	8.8%	77	12.1%	147
News Corp. (Fox)	\$3,260	7.2%	51	7.2%	51
A&E Networks	\$2,504	5.5%	30	5.5%	30
Discovery	\$1,944	4.3%	18	4.3%	18
Comcast	\$1,505	3.3%	11	N/a	N/a
Liberty Media	\$1,371	3.0%	9	3.0%	9
Scripps	\$1,251	2.7%	8	2.7%	8
Other	\$6,265	13.8%	19	13.8%	19
Total	\$45,491	100.0%	1144	100.0%	1202

Source: SNL Kagan, SNL Kagan Cable Network Ownership Data, Economics of Basic Cable Networks (2009 ed.).

The combined company would control only 12.1% of the market, which would place the merged company in 4th place among cable programming companies, the same position that NBC Universal occupied prior to the proposed merger. Post-merger HHIs would only be 1202, and the merger would lead to an increase of only 58 points. Under the thresholds provided by the

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<sup>58</sup> Estimates by SNL Kagan 2009 (combining advertising and affiliate revenue).

Merger Guidelines, regulatory authorities should conclude without further analysis that the horizontal impact of this merger on the market for television networks will not adversely affect consumers.

Evaluating the market power in terms of primetime Nielsen ratings instead of total revenue tells a similar story. NBC is again in 4th place, with a market share of 11.5%, while Comcast controls a mere 2.4% of the market for cable television networks. The post-merger HHI would be 1249, and the merger would lead to an increase of only 55 points. Calculating market shares based on total-day Nielsen ratings instead of primetime Nielsen ratings yields similar results. Again, under the Merger Guidelines, this data also supports the conclusion that the horizontal effects of this merger on the market for television networks will not adversely affect consumers.

**Figure 7: HHI in the Market for National Cable Networks as Measured by Primetime Nielsen Ratings (Full-Year Average for 2009)**

Owner	Nielsen Rating	Pre-Merger Share	HHI	Post-Merger Share	HHI
Viacom	7.0	19.9%	396	19.9%	396
Time Warner Inc.	6.0	17.1%	291	17.1%	291
Walt Disney	4.6	13.1%	171	13.1%	171
NBC Universal	4.0	11.5%	132	13.9%	192
A&E Networks	3.0	8.5%	72	8.5%	72
News Corp. (Fox)	2.7	7.5%	57	7.5%	57
Discovery	2.2	6.2%	38	6.2%	38
Scripps	1.5	4.4%	19	4.4%	19
Cablevision	0.9	2.4%	6	2.4%	6
Comcast	0.8	2.4%	6	N/a	N/a
Other	2.5	7.1%	7	7.1%	8
Total	35.1	100.0%	1194	100.0%	1249

Sources: Nielsen Media Research National MIT; SNL Kagan, Economics of Basic Cable Networks (2009 ed.).

This basic conclusion does not change if one expands the analysis to include broadcast television networks as well as cable networks. Beginning again by measuring markets in terms of total revenue, the post-merger HHI is 1186, and the merger would lead to an increase of only 67 points.

**Figure 8: HHI in the Market for All National Television Networks as Measured by Total Revenue (as of April 2009)**

Company	Revenue (millions)	Pre-Merger Share	HHI	Post-Merger Share	HHI
Walt Disney	\$12,638	20.7%	428	20.7%	428
Time Warner Inc.	\$8,766	14.3%	206	14.3%	206
General Electric	\$8,260	13.5%	183	16.0%	255
News Corp. (Fox)	\$5,724	9.4%	88	9.4%	88
CBS Corp.	\$5,546	9.1%	82	9.1%	82
Viacom	\$5,528	9.0%	82	9.0%	82
A&E Networks	\$2,504	4.1%	17	4.1%	17
Discovery	\$1,944	3.2%	10	3.2%	10
Comcast	\$1,505	2.5%	6	N/a	N/a
Liberty Media	\$1,371	2.2%	5	2.2%	5
Other	\$7,328	12.0%	13	12.0%	13
Total	\$61,114	100.0%	1119	100.0%	1186

Sources: SNL Kagan, SNL Kagan Cable Network Ownership Data, Economics of Basic Cable Networks (2009 ed.).

The same is true if one includes both broadcast and cable networks and measure market share in terms of primetime Nielsen rating. The post-merger HHI is 1114, and the merger would lead to an increase of only 42 points. Similar results hold if one uses total day Nielsen ratings instead of primetime ratings.



**Figure 9: HHI in the Market for All National Television Networks as Measured by Primetime Nielsen Ratings (Full-Year Average for 2009)**

Company	Nielsen Rating	Pre-Merger Share	HHI	Post-Merger Share	HHI
Walt Disney	8.8	15.0%	225	15.0%	225
NBC Universal	8.7	14.7%	217	16.2%	261
News Corp. (Fox)	8.0	13.6%	184	13.6%	184
Viacom	7.0	11.9%	141	11.9%	141
Time Warner Inc.	6.5	11.0%	121	11.0%	121
CBS Corp.	6.3	10.8%	116	10.8%	116
A&E Networks	3.0	5.1%	26	5.1%	26
Univision	2.2	3.7%	14	3.7%	14
Discovery	2.2	3.7%	13	3.7%	13
Scripps	1.5	2.6%	7	2.6%	7
Cablevision	0.9	1.4%	2	1.4%	2
Comcast	0.8	1.4%	2	N/a	N/a
Other	3.0	5.1%	4	5.1%	4
Total	58.8	100.0%	1072	100.0%	1114

Sources: Nielsen Media Research National MIT; SNL Kagan, Economics of Basic Cable Networks (2009 ed.); Company websites and Form 10-K filings.

As noted earlier, the Internet has become an increasingly important source of video programming. In this market, the amounts controlled by the merging parties are trivial. NBC Universal controls only 0.7% of online video properties as measured by videos viewed. Comcast is even smaller at 0.3%.<sup>59</sup> As a result, the merger would only cause HHI to increase by 3. NBC Universal holds a 32% stake interest in Hulu. It is not clear whether this holding is sufficient to attribute an ownership interest to NBC Universal. Hulu operates independently of both companies and has its own management. In any event, Hulu controls only 4.0% of the market for online video programming. Even if it is included and all nonprofessional video content is omitted, the merger would only cause HHI to increase by 19.

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<sup>59</sup> comScore, Media Metrix Report, Nov. 2009, available at <http://www.comscore.com>.

No matter how the issue is framed, the level of horizontal concentration in the market for video programming resulting from this merger is sufficiently low to justify clearing the merger without any serious inquiry. In one respect, however, the advent of Internet video serves as a cautionary tale. One of the major differences between Internet distribution and conventional distribution of video programming is that advertising rates are much lower on the Internet. As a result, producers of video programming are facing much the same quandary as newspapers, another great source of high-quality content. As the shift to online distribution caused advertising revenue to dwindle, newspapers were forced to change their business model. Newspapers either need to find new sources of revenue, or they need to drastically reduce their costs. Newspapers also sought repeal of the newspaper-broadcast cross-ownership rule, only to see these efforts blocked by opponents. Many of those who initially opposed these reform efforts have since changed course and are now looking for ways to bolster the newspaper industry.

Producers of video programming face the same challenge. They are responding to the reduction in advertising revenue by exploring new pricing models, even those that may require consumers to pay for content that they received for free during the early, exploratory days of Internet video. In addition, they are exploring new forms of cross-ownership to reduce costs and to better leverage their programming properties. The path followed by the newspaper industry should serve as a reminder of the dramatic changes that are transforming media industries and the potential costs of limiting companies' ability to respond to those changes.

#### IV. VERTICAL INTEGRATION BETWEEN THE MARKET FOR TELEVISION NETWORKS AND THE MARKET FOR RETAIL VIDEO DISTRIBUTION

The preceding discussion established that the horizontal aspects of the proposed Comcast-NBC Universal merger do not exceed the thresholds generally used to evaluate when such a merger might potentially harm consumers. Whatever potential harms that may result from the merger must thus lie in the vertical integration between video programming and distribution.

Vertical integration theory has long been a source of tremendous controversy in antitrust law.<sup>60</sup> Some basic points of consensus have emerged and are now reflected in the *Non-Horizontal Merger Guidelines*.

First, the firm must have market power in one market (typically called the primary market). Without market power in the primary market, the merging firm would have nothing to use as leverage over the other market. Market power in the primary market is assessed according to HHI. Because, as noted earlier, vertical mergers raise fewer anticompetitive concerns than horizontal mergers, the guidelines indicate that antitrust authorities are unlikely to challenge a vertical merger unless HHI in the primary market exceeds 1800.<sup>61</sup>

Second, the other, vertically related market (typically called the secondary market) must be structured in a way that makes it vulnerable to monopolization. Otherwise, any attempt by the merging firm to use its control over the primary market to exert pressure on the secondary

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<sup>60</sup> See Yoo, *supra* note 1, at 187-205 (tracing the longstanding debate between the Chicago and post-Chicago schools of antitrust law and economics).

<sup>61</sup> NON-HORIZONTAL MERGER GUIDELINES, *supra* note 15, § 4.213, at 28.

market would simply cause consumers to shift their purchases to other producers. This typically requires that the secondary market be protected by entry barriers.<sup>62</sup>

Third, even if these structural preconditions are met, the Merger Guidelines recognize that the presence of offsetting efficiencies might nonetheless justify permitting a merger to go forward even when the market is structured in such a manner as to raise the possibility that the merger might have some anticompetitive effects.<sup>63</sup>

In the case of the proposed Comcast-NBC Universal merger, the primary market is presumably the market for retail video distribution, which is to be used as leverage over the programming market. Although television networks would, of course, like to have the broadest reach possible, they do not care if they can reach viewers in any particular location so long as they can reach a sufficient number of viewers nationwide to achieve minimum efficient scale. The market in which networks contract with MVPDs is thus a national one. To programmers, it is national reach, not local reach, that matters.

The foregoing discussion of the potential horizontal issues reveals that the national market for retail video distribution is not even remotely close to the 1800 HHI level of concentration needed for vertical integration to even plausibly pose an anticompetitive threat. Moreover, as of 2006, there were 565 cable networks already on the air, with another 83 in the planning stages.<sup>64</sup> Given this level of deconcentration and the ease of entry, it is hard to see how anyone could credibly argue that the merger poses a threat to consumers.

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<sup>62</sup> *Id.* § 4.212, at 28.

<sup>63</sup> *Id.* § 4.24, at 30.

<sup>64</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 550 ¶ 20, 635 ¶ 193 (2009).

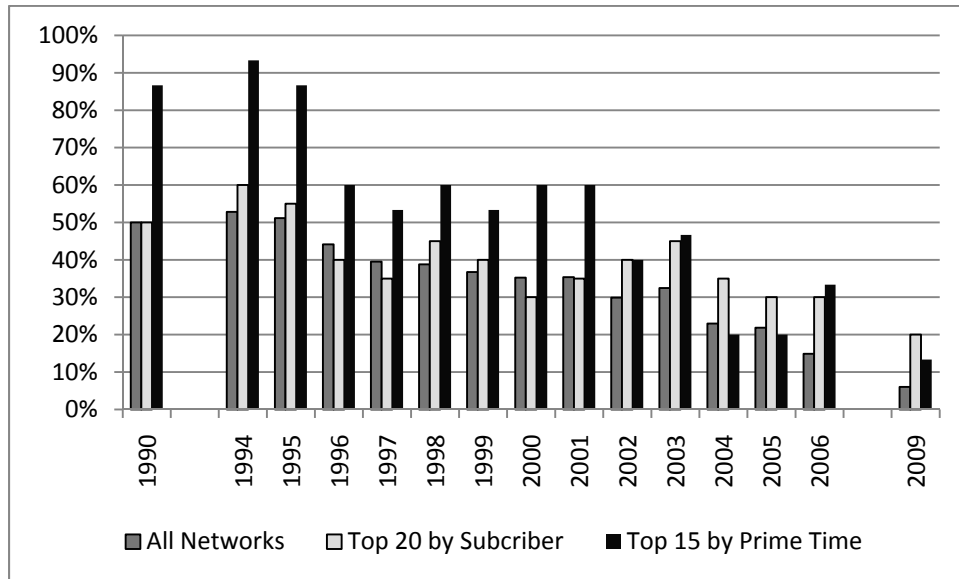
**Figure 10: Vertical Integration Between Cable Networks and MVPDs**

<b>Year</b>	<b>Total Cable Networks</b>	<b>Vert. Integ. Among All Cable Networks</b>	<b>Pct. Vert. Integ.</b>	<b>Vert. Integ. Among Top 20 Networks by Subscriber</b>	<b>Pct. Vert. Integ.</b>	<b>Vert. Integ. Among Top 15 Networks by Viewership</b>	<b>Pct. Vert. Integ.</b>
1990	70	35	50%	10	50%	13	87%
1994	106	56	53%	12	60%	14	93%
1995	129	66	51%	11	55%	13	87%
1996	145	64	44%	8	40%	9	60%
1997	172	68	40%	7	35%	8	53%
1998	245	95	39%	9	45%	9	60%
1999	283	104	37%	8	40%	8	53%
2000	281	99	35%	6	30%	9	60%
2001	294	104	35%	7	35%	9	60%
2002	308	92	30%	8	40%	6	40%
2003	339	110	32%	9	45%	7	47%
2004	388	89	23%	7	35%	3	20%
2005	531	116	22%	6	30%	3	20%
2006	565	84	15%	6	30%	5	33%
2009	478	27	6%	4	20%	2	13%

Sources: FCC Annual Video Competition Reports; Nielsen Media Research National MIT, Annual Prime HH 2005-2009; SNL Kagan, Economics of Basic Cable Networks 2008, pp. 88-90, 117, 161; SNL Kagan, TV Network Summary; SNL Kagan, Economics of Basic Cable Networks 2009, Section VII.

In addition, over the past decade, the level of vertical integration between cable networks and MVPDs has been declining steadily. For example, in 2008, News Corp. divested itself of its 2004 acquisition of DirecTV. Furthermore, in early 2009, Time Warner separated its programming and retail distribution assets when it spun off its cable operations into a separate company known as Time Warner Cable. As a result, vertical integration in the cable industry has never been lower.

**Figure 11: Vertical Integration Between Cable Networks and MVPDs**



Sources: FCC Annual Video Competition Reports; Nielsen Media Research National MIT, Annual Prime HH 2005-2009; SNL Kagan, Economics of Basic Cable Networks 2008, pp. 88-90, 117, 161; SNL Kagan, TV Network Summary; SNL Kagan, Economics of Basic Cable Networks 2009, Section VII.

The belief that vertical integration is unlikely to harm consumers unless the structural preconditions specified in the Merger Guidelines are met is based on more than just theory. Recent years have witnessed numerous vertical mergers in relevant industries, including News Corp.'s 2004 acquisition (and subsequent spinoff) of DirecTV, America Online's 2001 acquisition (and subsequent spinoff) of Time Warner, as well as Time Warner's 1996 acquisition of Turner Broadcasting. In each case, the vertical aspects of the merger did not pose a threat to consumers. In addition, with News Corp. undoing its acquisition of DirecTV and Time Warner spinning off its cable operations into a separate company, the industry has exhibited a strong trend toward vertical disintegration.

As noted above, standard antitrust analysis recognizes that a merger may nonetheless be approved if it creates efficiencies sufficient to offset any anticompetitive effects that may be

present. Commentators have frequently discussed how vertical integration in the cable industry can create efficiencies.<sup>65</sup> It is not necessary to rehearse the many ways that vertical integration can create efficiencies that promote competition and benefit consumers. For now, it suffices to note that both Congress and the Commission have long recognized that vertical integration can produce efficiencies in the production, distribution, purchasing, and marketing of video programming which can reduce subscriber costs and enable cable operators to make additional investments in physical infrastructure and in innovative and high-quality programming services.<sup>66</sup>

In short, under generally accepted antitrust principles, the relevant markets are too unconcentrated to create a sufficient danger of harm to consumers to justify intervention. The

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<sup>65</sup> For the most detailed analyses, see Yoo, *supra* note 1, at 192-200, 232-37; DAVID WATERMAN & ANDREW A. WEISS, VERTICAL INTEGRATION IN CABLE TELEVISION 45-54 (1997). For other useful discussions, see George S. Ford & John D. Jackson, *Horizontal Concentration and Vertical Integration in the Cable Television Industry*, 12 REV. INDUS. ORG. 501, 505-06 (1997); Ayako Suzuki, *Market Foreclosure and Vertical Merger: A Case Study of the Vertical Merger Between Turner Broadcasting and Time Warner*, 27 INT'L J. INDUS ORG. 532, 534 (2009).

<sup>66</sup> For the most recent statement by the FCC, see *Commission's Cable Horizontal and Vertical Ownership Limits*, Fourth Report & Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134, 2194 ¶ 142 (2008) (noting that "[b]oth Congress and the Commission have recognized that vertical integration can produce efficiencies in the production, distribution, and marketing of video programming, enabling cable operators to make additional investments in distribution plant and programming" and citing S. REP. NO. 102-92 at 26-27, 81 (1991); and H.R. REP. NO. 102-628, at 41 (1992)).

For other similar statements by the FCC, see *Adelphia Order*, *supra* note 11, at 8238 ¶ 71; *Commission's Cable Horizontal and Vertical Ownership Limits*, Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 9374, 9446 ¶ 146, 9449-50 ¶¶ 156-160 (2005); *News Corp.-Hughes Order*, *supra* note 19, at 507-08 ¶ 70, 545 ¶ 155, 618-20 ¶¶ 339-344, 621 ¶ 351; *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, Further Notice of Proposed Rulemaking, 16 FCC Rcd 17312, 17333 ¶ 42, 17350 ¶ 80 (2001); *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 Vertical Ownership Limits*, Memorandum Opinion and Order on Reconsideration of the Second Report and Order, 10 FCC Rcd 7364, 7366 ¶ 6 (1995); *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection Act of 1992*, Second Report and Order, 8 FCC Rcd 8565, 8568-69 ¶ 7, 8584-85 ¶ 44, 8594-95 ¶ 68 (1993), *rev'd & remanded on other grounds sub nom. Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1137-39 (D.C. Cir. 2001); *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions*, Report and Order and Further Notice of Proposed Rule Making, 8 FCC Rcd 6828, 6860 ¶ 208 (1993); *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions*, Notice of Proposed Rule Making and Notice of Inquiry, 8 FCC Rcd 210, 219 ¶ 44 (1992); *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rule Making, 8 FCC Rcd 194, 195 ¶ 5 (1992); 1990 Report on Cable Competition, *supra* note 45, at 5008-10 ¶¶ 82-86.

strong trends in these particular industries toward vertical disintegration makes such harm to consumers even less likely.

## VI. EMPIRICAL STUDIES OF VERTICAL INTEGRATION IN THE CABLE INDUSTRY

My conclusions are consistent with other empirical studies of vertical integration in the cable industry appearing in the peer-reviewed literature. The analysis most similar to mine is Eli Noam's book on *Media Ownership and Concentration in America*. Noam reviewed the history of concentration in both the national markets for MVPDs and television networks from 1984 to 2005. Noam's internal analysis is rich and full of detail. Most importantly for our purposes is the fact that his calculations of HHIs in the industries considered here are similar to mine.<sup>67</sup> These data lead him to conclude that industry concentration in mass media remains at the lower end of the range defined by the Merger Guidelines as moderately concentrated.<sup>68</sup> Although concentrations levels have gradually increased between 1984 and 2005, "their average level of concentration is not in the range that would normally raise antitrust action if encountered in other industries. Hence, if one seeks a systematic deconcentration of media to a level below the prevailing one, the general antitrust processes will usually not work, except in extreme cases."<sup>69</sup> Noam's core conclusion thus confirms my conclusion that the industries involved in these mergers are not sufficiently concentrated to raise concerns under conventional antitrust principles.

Most empirical studies that have assessed the welfare impact of vertical integration in the cable industry have similarly found that vertical mergers do not harm and likely benefit

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<sup>67</sup> ELI M. NOAM, *MEDIA OWNERSHIP AND CONCENTRATION IN AMERICA* 69-81, 92-97 (2009).

<sup>68</sup> *Id.* at 422.

<sup>69</sup> *Id.* at 423.



consumers<sup>70</sup> or are ambiguous.<sup>71</sup> Only one study (by Ford and Jackson) found that vertical integration in the cable industry reduced consumer welfare, and that was by a mere \$0.60 per cable subscriber per year,<sup>72</sup> an amount that a recent survey of the empirical literature on vertical integration conducted by four members of the FTC staff termed “miniscule.”<sup>73</sup>

Indeed, the survey conducted by the FTC staff members found that the Ford-Jackson study mentioned above represented the only one of the twenty-two published empirical studies that conducted a full welfare analysis in which vertical integration harmed consumers. On the contrary, “a far greater number of studies found that the use of vertical restraints in the particular context studied improved welfare unambiguously.”<sup>74</sup> These authors were struck by the “paucity of support for the proposition that vertical restraints/vertical integration are likely to harm

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<sup>70</sup> Tasneem Chipty, *Vertical Integration, Market Foreclosure, and Consumer Welfare in the Cable Television Industry*, 91 AM. ECON. REV. 428, 449 (2001); Suzuki, *supra* note 65, at 542; Michael G. Vita, *Must Carry Regulations for Cable Television Systems: An Empirical Analysis*, 12 J. REG. ECON. 159 (1997).

<sup>71</sup> These studies found evidence consistent with both anticompetitive and efficiency explanations for vertical integration, but declined to assess whether the net impact on consumer welfare was positive or negative. See WATERMAN & WEISS, *supra* note 65, at 101-05, 143; Dong Chen & David Waterman, *Vertical Ownership, Program Network Carriage, and Tier Positioning in Cable Television: An Empirical Study*, 30 REV. INDUS. ORG. 227, 249 (2007); see also Jun-Seok Kang, *Reciprocal Carriage of Vertically Integrated Cable Networks: An Empirical Study* 20 (paper presented at the 33rd Telecommunications Policy Research Conference Aug. 30, 2005), [http://web.si.umich.edu/tprc/papers/2005/423/TPRC\\_FINAL\\_Submission\\_Jun.pdf](http://web.si.umich.edu/tprc/papers/2005/423/TPRC_FINAL_Submission_Jun.pdf).

The recent study commissioned by the FCC candidly acknowledges that the data used by that study cannot determine which effect dominates. Austan Goolsbee, *Vertical Integration and the Market for Broadcast and Cable Television Programming* 20 (FCC Media Ownership Research Study No. 9 Apr. 2007), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-07-3470A10.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A10.pdf). It did find evidence that the author thought made the efficiency justification less likely. *Id.* at 22-24. Peer review of this report has called the methodology into question, pointing out that the primary measure of vertical integration employed by the FCC study used combined three separate aspects of vertical integration’s potential effects. As such, the measure could not effectively distinguish between potential procompetitive and anticompetitive effects. David Waterman, *Peer Review of Vertical Integration and the Market for Broadcast and Cable Television Programming*, by Austan Goolsbee (Federal Communications Commission Study No. 9, April, 2007; MB Docket No. 06-121) at 2-3 (Sept. 3, 2007), [http://www.fcc.gov/mb/peer\\_review/prstudy9.pdf](http://www.fcc.gov/mb/peer_review/prstudy9.pdf); see also Thomas W. Hazlett, *Vertical Integration in Cable Television* 20-21 (Oct. 19, 2007), <http://www.arlingtoneconomics.com/studies/vertical-integration-in-cable-television.pdf>. The FCC study also cites the fact that cable operators tend to carry vertically integrated channels. Goolsbee, *supra*, at 25-30. The literature generally recognizes that this effect is ambiguous and may reflect the efficiencies provided by vertical integration instead of foreclosure. See WATERMAN & WEISS, *supra* note 65, at 101-05; Chipty, *supra* note 70, at 450; Chen & Waterman, *supra* note 71, at 249; Hazlett, *supra* note 71, at 3, 5; Kang, *supra* note 71, at 20.

<sup>72</sup> Ford & Jackson, *supra* note 65, at 515.

<sup>73</sup> James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT’L J. INDUS. ORG. 639, 648 (2005).

<sup>74</sup> *Id.*

consumers.”<sup>75</sup> The survey thus concluded that “[m]ost studies find evidence that vertical restraints/vertical integration are pro-competitive” and that the weight of the evidence “suggests that vertical restraints are likely to be benign or welfare enhancing.”<sup>76</sup>

Another survey published in the *Handbook of Antitrust Economics* similarly reviewed twenty-three published empirical studies of vertical restraints. Despite the relatively small sample size, the authors found the empirical evidence to be “quite striking,” “surprisingly consistent,” “consistent and convincing,” and even “compelling.”<sup>77</sup> As a general matter, “privately imposed vertical restraints benefit consumers or at least do not harm them,” while government mandates or prohibitions of vertical restraints “systematically reduce consumer welfare or at least do not improve it.”<sup>78</sup> Together “[t]he evidence . . . supports the conclusion that in these markets, manufacturer and consumer interests are apt to be aligned, while interference in the market [by the government] is accomplished at the expense of consumers (and of course manufacturers).”<sup>79</sup> The authors conclude that “the empirical evidence suggests that in fact a relaxed antitrust attitude towards [vertical] restraints may well be warranted.”<sup>80</sup>

In the absence of structural considerations or empirical evidence that make it likely that the proposed merger will harm consumers, there seems little justification for imposing additional conditions on this merger.

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<sup>75</sup>

*Id.*

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*Id.* at 658, 662.

<sup>77</sup>

Francine Lafontaine and Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, in *HANDBOOK OF ANTITRUST ECONOMICS* 392, 408-09 (Paolo Buccirossi ed., 2008).

<sup>78</sup>

*Id.* at 408.

<sup>79</sup>

*Id.* at 409.

<sup>80</sup>

*Id.*

## CONCLUSION

In evaluating the proposed merger between Comcast and NBC Universal, one should recall that this process began when General Electric decided to divest its media assets in order to refocus management attention on its core businesses. At this point, then, the question is not *if* NBC Universal will be sold, but rather *to whom*. In a perfect world, General Electric would sell NBC Universal to a merging party that would not increase horizontal concentration in any market and for whom the merger would not create any violations of FCC rules. Although the elaborate nature of the regulatory regime makes finding such merger partners exceedingly difficult, General Electric has found just such a merger partner in Comcast. Regulators considering whether to approve this transaction must not only evaluate this merger on its own terms. They must also evaluate it in comparison to the likely alternatives should General Electric be prevented from selling NBC Universal to Comcast. They should move to block the merger only if they believe that the next potential transaction would pose fewer problems under competition policy as the transaction under review today.

The fact that the proposed merger would not require any new waivers demonstrates eloquently that the proposed merger does not run afoul of any current FCC regulations. In addition, the conventional benchmarks associated with antitrust law strongly suggest that the proposed Comcast-NBC Universal merger is sufficiently unlikely to harm consumers to merit approval without any significant further analysis. The relevant markets are not structured in a way that the combination of these two firms will have any anticompetitive horizontal or vertical effects. Suggestions that regulatory authorities impose additional conditions before clearing it thus seem unjustified. To the extent that vertical concerns exist, regulatory regimes such as the program access and leased access are already in place to address the problem.

One need not believe that the existing regulatory regimes are perfect in order to forego imposing conditions on this merger. At best, a merger condition would solve the problem with respect to one industry participant without addressing what is an industry-wide problem, which in turn would raise questions of fairness and good regulatory practice. The correct course of action when confronted with regulations that are imperfect is not to improvise a company-specific solution simply because a particular party happens to be seeking clearance of a merger. Instead, the better approach is to open a general proceeding to deal with any problems that may exist on an industry-wide basis. In the wake of an era during which the FCC was often criticized for failing to follow good administrative practices, insisting on the integrity of regulatory processes would appear to be particularly important.